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JAMES H. McKENNEY

No. 415.

Brief of Lindsay for D. E.

Filed Nov. 5, 1897.

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in-error,

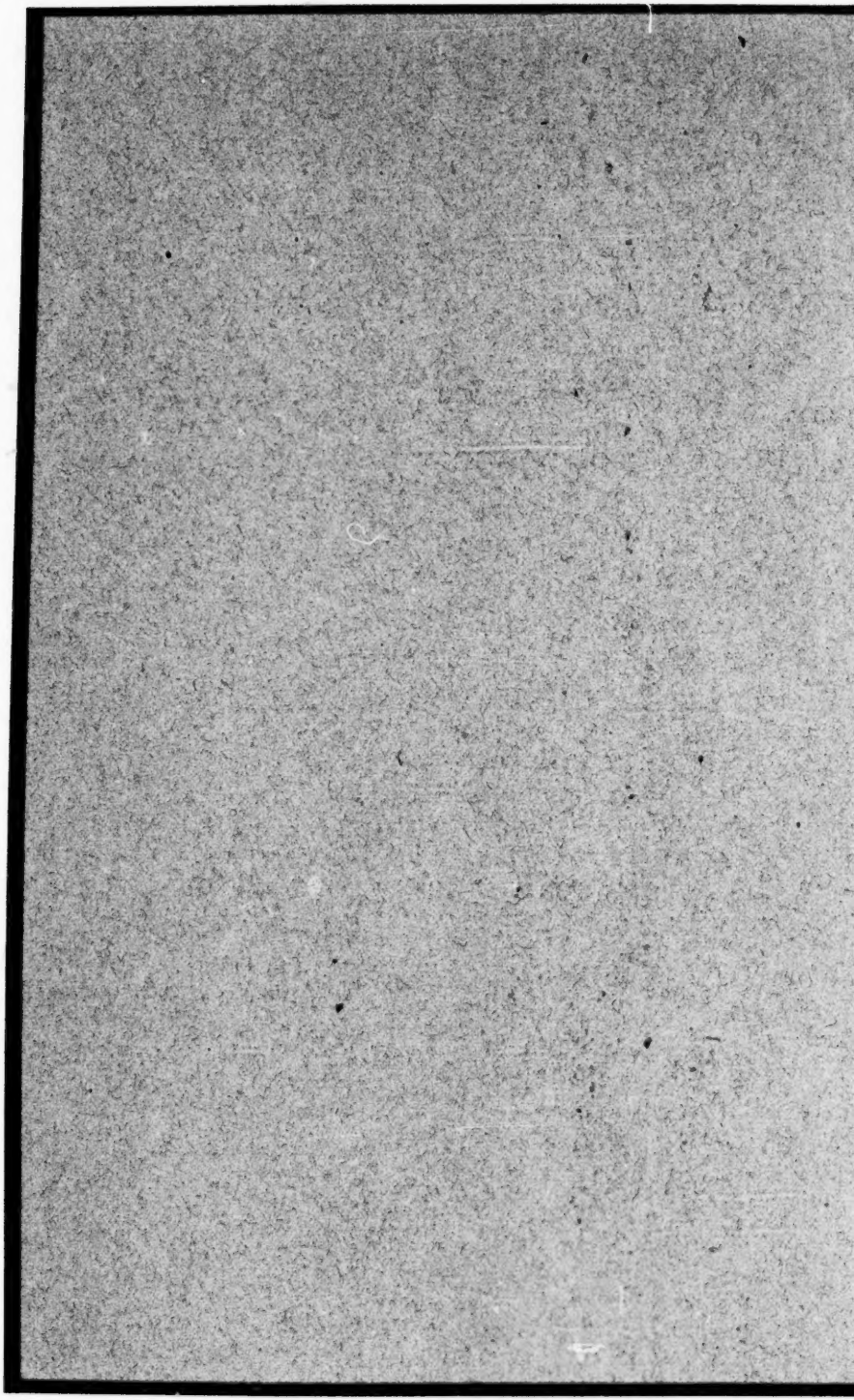
v.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-error.

BRIEF FOR THE DEFENDANT-IN-ERROR.

W. M K. OLCOTT,
DISTRICT ATTORNEY.

JOHN D. LINDSAY,
ROBERT C. TAYLOR,
Of Counsel.



In the Supreme Court of the United States,

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BENJAMIN W. HAWKER,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

Statement.

The plaintiff in error was convicted in the Court of General Sessions of the Peace of the City and County of New York, at the September Term, 1896, of the misdemeanor of practicing medicine after having been convicted of a felony, in violation of a statute of the State of New York known as the Public Health Law, which provides that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine, or shall so practice, shall be guilty of a misdemeanor."
>
> Chap. 661, Laws of 1893, sec. 153, as amended by chap. 398, Laws of 1895.

The indictment alleged, and it was conceded on the trial that on the 6th day of March, 1878, the plaintiff in error was convicted in the Court of Sessions of the County of Kings, in the State of New York, of the felony of abortion, and was thereupon sentenced to imprisonment in the Kings County Penitentiary for the term of ten years, and that after such conviction, to wit: on the 22d day of February, 1896, he practiced medicine in the City and County of New York, by examining, treating and prescribing for one Dora Hoenig, as a physician.

At the time of the respondent's conviction (in 1878) of the felony of abortion, a conviction for that offense, whether committed by a physician or any other person, rendered the offender liable to a penalty of imprisonment and disfranchisement, as in all cases of conviction for felony; but the fact of a physician having been convicted of abortion or any other felony did not, at that time, of itself, disqualify him from subsequently practicing his profession, or render him liable to prosecution in case he did so; and no attempt was made to exclude convicted felons, *as such*, from the practice of medicine, till the year 1887 (nine years after the respondent's conviction) when the legislature passed an act which provided that—

> "No person shall be licensed or permitted to practice physic or surgery in this state who has been convicted of a felony by any court of competent jurisdiction; and if any person who is or hereafter shall be duly licensed to practice physic or surgery in this state, shall be convicted of a felony, as aforesaid, his or her license to so practice, if any, shall be revoked, by the fact of such conviction having been had. * * * Any person * * * who, after conviction of a felony, as aforesaid, shall attempt to practice physic or surgery in this state * * * shall be deemed guilty of a misdemeanor. * * *"

Chap. 647, Laws of 1887, sec. 6.

In 1893, the statutes regulating the practice of medicine were engrafted into and made a part of the statute called the Public Health Law, enacted that year (chap. 661, Laws of 1893), and the above-quoted provision of the Act of 1887, section 6, was enlarged so as to provide that—

> "Any person * * * who, after conviction of a felony, shall attempt to practice medicine * * * shall be guilty of a misdemeanor. * * *

Chap. 661, Laws of 1893, sec. 153.

And in 1895 the provision was made to apply in terms to persons who, after conviction of a felony actually practiced medicine, as well as those who attempted to do so.

Chap. 398, Laws of 1895 (*supra*).

The plaintiff in error demurred to the indictment upon the grounds—

(1) That the Act of 1895, upon which the prosecution was based, is not retrospective in its operation, that is to say, does not apply to persons convicted of felonies previous to the time of its passage; and

(2) That if construed as applying to persons convicted previous to its passage, then the act is, in that respect unconstitutional, as being *ex post facto* and void.

The demurrer was overruled, and on the trial the plaintiff in error admitted that all the facts set forth in the indictment were true, whereupon he was found guilty and sentence was imposed.

He thereupon appealed from the judgment of the General Sessions to the Appellate Division of the Supreme Court of the State of New York, and on the 10th day of February, 1897, the Appellate Division reversed the judgment.

The defendant in error then appealed to the Court of Appeals of the State of New York from the judgment of reversal, and on the 16th day of March, 1897, the Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of conviction; whereupon the plaintiff in error sued out a writ of error for the purpose of bringing the question involved before this court for final adjudication.

This question, briefly stated, is whether the provision of the Public Health Law violated by the plaintiff-in-error is a lawful exercise of the police power of the State, or is an *ex post facto* law, or one in the nature of a bill of attainder, or a bill of pains and penalties, and thus included in the powers, the exercise of which is forbidden to the several states by the constitution of the United States.

The defendant-in-error contends that the legislation in question absolutely excludes all persons who have been at any time convicted of felonies, whether otherwise qualified or not, from the right of practicing medicine in the state of New York, and that being manifestly designed for the protection of the public health and safety against the danger, real or anticipated, of permitting convicted felons to practice, or to continue practicing medicine, and being calculated, intended, convenient and appropriate to accomplish that purpose, it must be upheld as a valid and reasonable exercise of the police power of the state.

First—The intention of the legislature that the statute should prohibit all persons from practicing medicine who had been theretofore, or who should thereafter, be convicted of a felony, is apparent from a reading of the statute itself.

While the words of the Act of 1887 may have been intended to apply only to the latter class, the Acts of 1893

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and 1895 admit of no such construction. The language is clear and unambiguous, and prohibits the practice of medicine by—

> "any person * * * after conviction of a felony."

Apart from the clear meaning of these words, the policy of the law to exclude all persons convicted of felony is shown by another section of the Public Health Law (L. 1893, chap. 661, sec. 140):

> "Nor shall *any person* practice medicine who has *ever been convicted of a felony by any court*, or whose authority to practice is suspended or revoked by the regents on recommendation of a state board."

Thus it is obvious that the present law was intended to absolutely forbid the practice of medicine by felons. Section 140 plainly says they shall not practice, and section 153 makes the violation of this prohibition a misdemeanor.

In the sense that the statute was intended to apply to all persons convicted before its passage, as well as those subsequently convicted, it is therefore clearly retrospective in its operation.

Second—The police power extends to the protection of persons and property within the state. In order to secure that protection either may be subjected to restraints and burdens by legislative acts. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited. Restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.

If the legislation is calculated, intended, convenient or appropriate to accomplish the good of protecting the public health and of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial discretion.

> "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide*, for the protection of the public, is beyond the reach of judicial inquiry."
>
> Louisville & Nashville Ry. *vs.* Kentucky, 161 U. S., 677 (at p. 700).

The exercise of the police power of the state does not deprive anybody of life, liberty or property within the meaning of the Fourteenth Amendment.

> Barbier *vs.* Connelly, 113 U. S., 27.
> Powell *vs.* Pennsylvania, 127 U. S., 678, 683.
> *In re* Rahrer, 140 U. S., 545.
> Giozza *vs.* Tiernan, 148 U. S., 657.
> R. R. Co. *vs.* Bristol, 151 U. S., 556.

Third—In the exercise of its police power the state has the absolute right to make such laws as it may deem proper, regulating the practice of medicine or surgery, and prescribing the conditions upon which any person will be allowed to practice such professions within its territorial limits.

> Dent *vs.* West Virginia, 129 U. S., 114.
> People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529 (at p. 539).

Eastman *vs.* State, 109 Ind., 278.
Orr *vs.* Meek, 111 Ind., 40.
Richardson *vs.* State, 47 Ark., 562.
State *vs.* State Board, 32 Minn., 324.

That power is not confined to the dictation of terms, or the requirement of qualifications, preliminary to the acquirement of an original permission to practice, but also includes the authority to impose new and additional conditions upon which one already engaged in the actual practice of the medical or surgical profession is permitted to continue such practice.

The same reasons that control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as a qualification for his continuance in practice, and a failure to meet such further qualification justifies his exclusion from the right to practice.

The nature and extent of the qualifications required must rest primarily upon the judgment of the state imposing them, subject only to the limitation that they must have some reasonable relation to the profession, and are designed to secure the public welfare.

Fourth—The claim that the statute operates to unlawfully deprive the plaintiff in error of a right of property, viz., his ability to earn a living by the practice of medicine, and that the effect of this deprivation is to aggravate his punishment for the offense of which he was convicted in 1878, cannot avail the defendant here, for there is nothing before this court to show that he was ever qualified or authorized under the laws of the State of New York to engage in such practice.

It does not appear from the record that he ever studied medicine, that he ever received a diploma from any medical college or university, that he was ever registered or licensed to practice medicine, or that he ever did, in fact, practice as a physician before the 22d day of February, 1896.

Fifth—But even though it were to be conceded that the plaintiff in error possessed, at the time of the passage of the statute under consideration, all the qualifications essential, under the then existing laws, to entitle him to practice medicine, and was at that time lawfully engaged in such practice, the enactment cannot be held to have deprived him of any *vested right*.

There is no vested right in the physician to follow his profession. So long as he possesses such qualifications as the legislature may legitimately impose, and abides by its regulations, he is privileged to enter upon and continue its practice, but beyond this his rights do not extend. Practically a practitioner of medicine is merely a licensee:

> "And some employments in which integrity is of vital importance it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable" (referring to the practice of medicine as one of these employments).
>
> Cooley's Cons. Lim. (6th Ed.), p. 745.

To the same effect, see—

Richardson *vs.* State, 47 Ark., 562.
Orr *vs.* Meek, 111 Ind., 40.
State *vs.* State Board, 32 Minn., 324.
Logan *vs.* State, 5 Tex. App., 306.
Ex parte Spinney, 10 Nev., 323.
Hewitt *vs.* Chavier, 16 Pick., 353.
Fox *vs.* Wash. Ter., 5 West Coast R., 339.

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The case of Dent *vs.* West Virginia (*supra*), arose upon a statute requiring all physicians, as a condition of being permitted to follow their profession, to either possess a diploma of a kind prescribed in the act, *or* to have actually practiced medicine ten years, and making the practice of medicine without such qualification a misdemeanor.

The defendant, who had no such diploma, but had actually practiced medicine for the five years immediately preceding the passage of the law—a perfectly lawful thing, and consequently a thing he had a *right* to do, till that time—continued his practice thereafter, and for so doing was convicted of a misdemeanor.

In his behalf it was urged (129 U. S., p. 121) that the denial of the right to practice his profession without the required certificate constituted an unlawful deprivation of his vested right and estate in his profession.

But this court held otherwise, and sustained the act as a proper exercise of the police power. Justice Field, delivering the opinion of the court, sustained the validity of the statute upon these grounds:

(1) There is no arbitrary deprivation of any such right where the exercise of a calling is not permitted because of a failure to comply with conditions imposed by the state for the protection of society, or to secure the public against the consequences of ignorance or incapacity, or the possibility of *deception and fraud* (p. 122).

(2) The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. *It is only when they have no*

relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation (p. 122).

(3) The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions (p. 123).

Sixth—Applying these principles to the case at bar, the only question to be considered is whether the exclusion of convicted felons from the practice of medicine will secure, or tend to secure, the general welfare, health or prosperity of the people against dangers, real or anticipated. We most confidently submit that it will.

(*a*) Learning, skill and experience are indeed primarily essential qualifications in a physician or surgeon; but it is quite as important, if not of paramount concern to the community, that the physician or surgeon who may be called upon to attend any citizen in the gravest peril should be a person who has not forfeited his right to public confidence.

That a convicted felon does forfeit his right to public confidence by the fact of his conviction cannot in reason be denied.

In all transactions involving considerations of trust and honor people commit their interests to men of high character and probity, and avoid those whose reputations are not above reproach. What relations in life are more close and sacred, and require greater confidence on the one side, and honor and integrity on the other, than those between the physician and his patients? In what other profession or field of occupation can greater public danger lie in the

possibility of criminal misconduct than in the medical profession?

(*b*) It cannot be reasonably argued that the legislature has not the right to prescribe as one of the conditions of a physician's privilege to practice, or to continue in practice, that he shall be a person of good moral character—obviously one of the most essential personal and individual attributes of the physician, the absence of which would directly impair his usefulness.

(*c*) The policy of the state of New York has always been, and since 1880 has been evidenced by express legislation, to require all candidates for licenses to practice to be "of good moral character."

See—

Chap. 513, Laws of 1880, sec. 4.
Chap. 507, Laws of 1890, sec. 8.

Similar requirements are prescribed in nearly all the other states:

Ala., Code, 1887, secs. 1297–1304.
Ark., Act XIV., 1893, sec. 2.
Cal., Act 1877–78, chap. 576.
Ill., Laws 1887, p. 225, sec. 1.
Kan., Gen. Stat., 1889, sec. 2450; Act 1893, April 10, sec. 2.
La., Const., 1879, Art. 178; Act 1882, No. 31, sec. 5.
Maryland, Act 1892, chap. 296.
Mass., Act 1894, chap. 459.
Me., R. S., 1883, chap. 13, sec. 9.
Minn., Act 1887, chap. 9, sec. 3.
Mo., Rev. Stat., 1889, sec. 6871.
Montana, Act Feb. 28, 1889, sec. 4.
Miss., Code 1892, secs. 3244, 3245.
Neb., Act 1891, chap. 35, sec. 19.

New Mexico, Comp. L. 1884, sec. 2562.
N. Car., Code 1883, sec. 3133.
Oklahoma, Comp. Stat. 1893, sec. 352.
Ohio, S. & B.'s Rev. St. 1890, sec. 4403.
Oregon, Act Feb. 1889, sec. 9.
Penn., Act May 18, 1893, sec. 13.
S. Car., Act 1890, chap. 454, sec. 2.
S. Dak., Act Feb. 16, 1893, secs. 5, 6.
Utah, Act 1892, chap. 72, sec. 8.
Vermont, Rev. Laws 1880, sec. 3915.
W. Va., Code 1890, chap. 150, sec. 10.

In the Minnesota case, before cited, an application for a license to practice medicine was refused on the ground that the Examining Board had determined the applicant's character to be bad. In denying a motion for a mandamus to compel the issuance of the license, Dickinson, *J.*, said:

> "But the legislature has surely the same power to require, as a condition of the right to practice this profession, that the practitioner shall be possessed of the qualifications of honor and good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority in the exercise of its general police power to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them *unfit to be trusted* with the discharge of its duties."

State *vs.* State Board, 32 Minn., 324.

(*d*) The same conditions which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions.

Dent *vs.* West Virginia (*supra*), at p. 123.

It is therefore perfectly clear that the state has a right at any time to exclude persons who are not of good moral

character from further practicing, although such requirement did not exist at the time they originally acquired permission to practice, regardless of the time their character became bad.

(*e*) The legislature has the right to declare the public danger to be as great from the practice of convicted felons, as from the practice of any other persons of bad moral character.

The very fact of conviction of a felony renders the offender an object of distrust. Formerly he was incapacitated from giving evidence, and even now, though under the laws of the State of New York, he is a *competent* witness—

> "the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question."
>
> New York Penal Code, sec. 714.

(*f*) We confidently submit that the exclusion of convicted felons from the practice of medicine most directly tends to protect the public against the possibility of fraud, deceit and professional misconduct.

Whether regarded as a legislative declaration that a convicted felon is, because of that fact, a person of bad moral character, or as a declaration that his conviction has deprived him of the right to public confidence, regardless of the question of his actual character, the conclusion is irresistible that the provision excluding all such convicts from the practice of the profession, was designed to benefit the welfare of the people, has *some* relation to the profession, and does, to some degree at least, tend to secure the public against deception and fraud. Under these circumstances

it must be upheld as a valid exercise of the police power, regardless of its possible hardship in any individual case.

Seventh—The courts will always assume that the object of the legislature was solely to promote the public comfort, welfare and safety; and if an act admits of two constructions that should be given to it which sustains it and makes it applicable in furtherance of the public interests.

It is argued on behalf of the plaintiff-in-error that the state may not take cognizance of the danger to which the public is liable from the practice of medicine by convicted felons, and may not, in order to remove such source of danger, exclude such felons from the medical profession as persons who have forfeited their right to the trust and confidence so essential to its practice, because by so doing the state would be punishing them again for offenses, the penalties of which they had already paid.

We respectfully submit that, even if the act under consideration were capable of being construed in accordance with this contention, *i. e.*, as inflicting an additional punishment for a past offense, it is also clearly susceptible of another and wholly different construction, obnoxious to no constitutional objection, namely, that no additional penalty was sought to be imposed for the past offense, but was to be incurred, and could only be incurred, by those who, in defiance of the legislative provision, persisted in continuance in practice as physicians after the legislature, for manifestly good cause, had excluded them from such practice.

No additional punishment is imposed for the felony committed before the passage of the act. The statute prohibits a felon engaged in the practice of medicine at the

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time of its enactment from continuing such practice, and if he violates the prohibition he commits a misdemeanor, for which he is punishable, wholly independent of the anterior crime. He is punished solely for his disobedience of the legislative mandate and after its enactment, and for nothing else.

Except for the nature of the disqualification the situation is precisely the same as that which arose in Dent *vs.* West Virginia (*supra*). There, upon the passage of the statute, the defendant, till that time lawfully engaged in the practice of his profession, became by legislative declaration disqualified from further practice because he had practiced for but five years instead of ten, and was not therefore a proper person to be thereafter entrusted with the responsible duties of the medical profession. Here, upon the passage of this statute, the defendant, till that time lawfully engaged in the practice of his profession, became, by legislative declaration, disqualified from further practice because he had been in the past convicted of a felony and *was then a convicted felon*, and was not therefore a proper person to be thereafter entrusted with the responsible duties of the profession.

In the Dent case the legislature of West Virginia imposed a qualification dependent on an arbitrarily determined period of experience. In the case at bar the qualification depends on the practitioner's character. In both cases the disqualification existed at the time of the passage of the act, and at the time of the alleged violation of its provisions. The offense consisted, not in the fact constituting the disqualification, but in practising, notwithstanding such disqualification, in defiance of the legislative prohibition.

In the Dent case the defendant had a perfect right to follow his profession up to the time of the passage of the act making a diploma or a ten years' practice a qualifica-

tion, and the absence of such diploma or less than ten years' experience a disqualification for future practice.

So, in the case at bar, the plaintiff-in-error, assuming him to have been a qualified practitioner at the time of the passage of the act making a conviction for a felony at any time before or afterward a disqualification, had a perfect right to follow his profession up to that time.

The state does not punish him because he was once convicted, but because, in defiance of its mandate, and after its provisions became operative, he persisted in the performance of a practice it had declared to be against public policy and inimical to the general welfare.

And this was precisely the situation in the Dent case, with the additional circumstance that there the defendant, who had not been convicted of any crime, and had been lawfully engaged in practice for five years, was adjudged guilty of a misdemeanor for the mere act of continuing the practice after the legislature had declared ten years' practice to be a prerequisite qualification therefor.

Eighth—The cases of Cummings *vs.* Missouri, 4 Wall., 277, and *Ex parte* Garland, *Ibid.*, 333, upon which the plaintiff in error mainly relies, are in no sense analogous to the case at bar. In both of those cases attempts were made by legislative enactments to deprive individuals of the right to pursue their lawful avocations for no cause legitimately affecting their qualifications therefor, and this court very properly held the legislation to be unconstitutional and void. It is to be noticed that in both of these cases the statute did not in terms disqualify the party in interest because of any past act of misconduct, but undertook to compel him *to do something*, viz.: take a test oath as a condition of being permitted to continue in the pursuit of his calling.

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In Cummings *vs.* Missouri the plaintiff-in-error, a Roman Catholic clergyman, at the close of the war could not, or would not, take a test oath to the effect that he had not sympathized with the South during the Rebellion. The Constitution of Missouri denied to those who could not take the test oath the right to follow any profession, and Cummings was prosecuted for misdemeanor for pursuing his profession—namely, that of a clergyman—not having taken the test oath.

This court held that the oath was *void*, stating among its reasons that the only proper qualifications for the privilege of pursuing any given pursuit or profession must be such as relate to the fitness or capacity of the party for such pursuit or profession; that the "test oath qualification bore no possible relation" to Cummings's fitness for his profession (p. 319); and that the disability prescribed for failure to take the oath created constituted punishment (p. 320).

The case of *Ex parte* Garland was similar to the case of Cummings. It was decided by this court at the same time, and also related to the power of imposing a test oath, and only differed from the former in that the defendant was an attorney in the United States courts, and the law in question was an act of Congress. The two cases were substantially disposed of together, for each opinion refers freely to the facts and circumstances of the other case. In holding the act unconstitutional, Mr. Justice FIELD apparently laid stress upon these facts, viz.:

The clauses of the test oath "all relate to past acts" (p. 376); the statute was directed against parties who had offended; its object was to exclude them from the practice of the law in the United States courts (p. 377); the profession of the attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers and its emoluments upon the will of its

creator; the attorney is not an officer of the United States, but of the court (p. 378); and finally *that the pardon blotted out the offender's guilt* (pp. 380–1).

It is of interest to note that both of these cases were decided by an almost equally divided court. Both cases proceeded upon the principle that a test oath for past conduct could in no wise be considered the imposition of a valid qualification; and *that the statutes were manifestly intended solely as punishment for past conduct.*

These cases were sought to be invoked twenty years later on behalf of the defendant in the Dent case (Dent *vs.* West Virginia, *supra*) as authorities against the constitutionality of the statute there under consideration. But the doctrine was held to be inapplicable to the questions there involved, this court saying:

> "There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the employ of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions *by the exaction* from them of an oath as to their past conduct respecting *matters which have no connection with such professions.* Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The Constitution of Missouri and the act of Congress in question in those cases were *designed* to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no *bearing upon their fitness* to continue in their profession. *The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state*" (p. 128).

Ninth—The right of the state to withhold, for any legitimate cause, any privilege subject to legislative control, is not to be disputed, and laws withholding such privilege and punishing its subsequent use because of past misconduct resulting in a *present unfitness* to enjoy it, have uniformly been upheld.

The authorities are in perfect accord that the enjoyment of a privilege dependent on qualifications determinable solely by the state itself, may be at any time absolutely prohibited for any proper cause, provided only the cause has some relation to the prohibition, and does in fact constitute a valid reason for it.

Thus in Murphy *vs.* Ramsey, 114 U. S., 15, an act of Congress of March 22, 1882, abridged the right of electors in the territories under previous laws, by denying to bigamists any further right to vote.

It was claimed that this law was *ex post facto* as to those who were already bigamists, but this court held otherwise, saying (per Matthews, *J.*):

> "It is argued that * * * to do so would give the statute a retrospective effect, and by thus depriving citizens of civil rights, merely on account of past offenses, or on account of acts which when committed were not offenses, would make it an *ex post facto* law, and therefore void (p. 40). * * * It is not because the person has committed the offense * * * and as an additional punishment for its commission that he is disfranchised (p. 42). * * * Upon this construction the statute is not open to the objection that it is an *ex post facto* law. It does not seek * * * to operate as a punishment upon any offense at all. The disfranchisement operates upon *the existing state* and condition of the person, and not upon a past offense. He alone is deprived of his vote who, when he offers to register, is *then in the state or condition* of a bigamist (pp. 42, 43). * * * It is precisely similar to an inquiry into the fact of nativity, of age, or of *any other status*

made necessary by law as a condition of the elective franchise (p. 43).

"*It rests with Congress* to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws; and it may therefore take away from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as *it may deem expedient*" (p. 44).

And so in the case at bar the prohibition of the statute operates solely upon the *existing state and condition* of persons engaged in the practice of medicine, and not upon their past offenses. He alone is deprived of his right to practice who, when the act is passed, is then in a state or condition, such as, upon grounds of the soundest public policy, renders him, in the judgment of the legislature, an unfit person to practice.

In Washington *vs.* State, 75 Ala., 582; s. c. 51 Am. Rep., 479 (1884), the indictment was for voting after conviction of a felony. The defendant was convicted in 1871. The disqualification was caused by the constitution of 1875. Said the court, per Somerville, *J.*:

"It is quite common, also, to deny the right of suffrage * * * to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot-box. * * * The presumption is that one rendered infamous by conviction of felony or other base offense, indicative of moral turpitude is *unfit to exercise the privilege of suffrage.* * * * It is proper, therefore, that this class should be denied a right, the exercise of which *might sometimes hazard* the welfare of communities. * * * The exclusion must, for this reason, be adjudged a mere disqualification, imposed *for protection and not for punishment* * * * withholding an honorable privilege, and not denying a personal right or attribute of personal liberty. * * * The clause of the Constitution * * *

> cannot, for the foregoing reasons, be considered as either an *ex post facto* law * * * or as in the nature of a bill of attainder. * * * It neither takes away any legal right nor imposes any legal burden."

So, following the same rule, in Foster *vs.* Police Commissioners, 102 Cal., 483 (May, 1894), it was held that a retrospective ordinance depriving persons of the right to a liquor license who had been convicted of felony, or who had carried on the business of selling liquors in places of amusement where females were employed, was not an *ex post facto* law, but simply furnished a standard applicable to all persons by which their fitness to conduct a business, in itself dangerous to the morals and good order of the city, was to be measured. Said the court, per Haynes, *J.*:

> Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is *evidence of the unfitness of such persons as a class;* nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.

In United States *vs.* Chew Cheong, 61 Fed. Rep., 200 (April, 1894), a Chinaman had been convicted of a felony. Afterward his right to take out a certificate to prevent his deportation was denied by a statute prohibiting the taking out of such certificates by persons convicted of felony.

It was claimed the law was *ex post facto* as to him, but the court held otherwise, saying, per Morrow, *J.*:

> "The law was not *ex post facto:* for the government had the inalienable right to expel all aliens; and to select criminals for deportation was the exercise of a just discrimination in the administration of the

laws and a wise authority in preserving the institutions of the country."

Conclusion—The judgment of the court below should be affirmed.

Respectfully submitted,

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